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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1 through 100, inclusive,

Defendants.

Case No. BC 422252

[Assigned to: Hon John L. Segal, Dept. 50]

DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

Date: May 22, 2012
Time: 8:30 a.m.
Dept: "50"

Action Filed: Sept. 22, 2009

I. INTRODUCTION AND SUMMARY

Plaintiff William Taylor tried this case in full from March 5 to March 15, 2012. Plaintiff did not advise the Court or defendant City of Burbank ("City") that he was reserving a request for relief beyond what he sought at trial. Apparently unsatisfied with the amount of the award in his favor, he now seeks additional "injunctive relief." He now claims to have silently withheld his request for this injunctive relief until post-trial, and asks the Court to enhance the award he received from the jury with this additional relief. In three pages of points and authorities, citing only one case, plaintiff asks for injunctive relief to undo claimed damage to his ability to employ in the future—even though future lost wages and other future economic damages were awarded by the jury—and injunctive relief to purge disciplinary records—even though he never directly appealed his termination and the general verdict made no findings as to his misconduct.

Plaintiff's cursory, after-the-fact request should be denied for each of the following reasons:

First, the Court should deny the motion because there is no substantive evidence of a violation of FEHA that would support injunctive relief, as plaintiff cannot link any retaliatory animus to the adverse employment decision to terminate him;

Second, the City's purported "demotion" by re-assigning plaintiff from the Captain assignment of Deputy Chief to another Captain position was not retaliatory but was justified in light of the significant problems occurring under plaintiff's supervision;

Third, the Court cannot and should not order any changes to or redaction of plaintiff's personnel records concerning his termination, the investigations or the findings therein, as those issues were not addressed in a mere general verdict, and were not challenged by plaintiff in an administrative appeal and/or writ of administrative mandamus;

Fourth, plaintiff elected his remedy by seeking, and obtaining, damages for future lost income and cannot now seek injunctive relief to avoid harm to future lost income;

Fifth, the Court should decline any order removing, purging or altering records, when such would not have resulted even from a direct writ action challenging his discipline and there is no basis asserted for ordering disclosures to POST or CalPERS; and

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Sixth, the Court should either decline to award injunctive relief at this time, or stay any order pending appellate review of the case.

II. STANDARDS ON REVIEWING EQUITABLE CLAIMS

Claims for injunctive relief are equitable in nature and are tried to the Court, with no right to a jury trial or findings on those issues. *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 756-757. A trial court should make its own independent findings on equitable claims, even where other parallel claims were tried to a jury. *A-C Co. v. Sec. Pac. Nat. Bank* (1985) 173 Cal. App.3d 462, 474. Thus, this Court is not bound by the jury verdict to decide any of the equitable issues or make any findings in plaintiffs favor. *Ruiz v. Ruiz* (1989) 104 Cal.App.3d 374, 378. In fact, in weighing equitable claims, a "general verdict rendered by the jury is insufficient and *should be disregarded*..." *Id.*(emphasis added). Thus, the general verdict rendered by the jury in this case is of no moment. Even if it had been a special verdict, it would be "merely advisory." *Id.* This Court must make its own findings based upon its own review of the testimony and evidence. *Id.*

III. THE REQUEST FOR INJUNCTIVE RELIEF IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. There Is No Evidence Of Retaliatory Animus

As discussed more fully in the City's Motion for New Trial or in the alternative JNOV, the Court should find that plaintiff is not entitled to relief (equitable or otherwise) on his claims. City incorporates those arguments herein. Below, City briefly highlights findings the Court should make such that even if the jury verdict is left undisturbed at this stage, equitable relief should be denied.

In order to prevail on a retaliation claim, plaintiff must have proven that the City's intent to retaliate against his participation in an activity protected by FEHA was a motivating reason for its termination of his employment. *See e.g. CACI* 2505(3). No substantial evidence was presented at trial to substantiate the jury's 9-3 verdict on the essential element of retaliatory animus for Plaintiff's termination. A party with the burden of proof on an issue must produce evidence establishing each essential fact required on his claim or defense. *See Cal. Evid. Code* §§ 500, 550; *Evans v. Paye* (1995) 32 Cal.App.4th 265, 281-82.

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To establish a prima facie case of retaliation, a plaintiff must show that he engaged in protected activity, that she was thereafter subjected to adverse employment action by her employer, and there was a causal link between the two. *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69-70. The causal link may be established by an inference derived from circumstantial evidence, such as a close proximity in time between the protected action and allegedly retaliatory employment decision, *Id.,* or a close relationship between the supervisors subject to the complaints and those who terminated the employee. *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 478 (causal link shown because "the same highly placed corporate officer who made the offending comments was also responsible for [plaintiff]'s termination" only a few months after the last complaint).

It was uncontroverted that Chief LaChasse with input from Deputy Chief Tom Angel made the decision to terminate Plaintiff for cause. But there was no substantial direct or indirect proof that LaChasse or Angel, neither of whom were with the BPD during any of the purported predicate acts, were motivated by any improper reason such as the claimed "whistle-blowing" or for Plaintiff's filing of a DFEH claim, or for his pre-emptive lawsuit questioning former Chief Stehr's decision to restructure the Department. *See Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 (cited in CACI 2505, "Directions for Use" ["there must be causal link between the retaliatory animus and the adverse action"]). The issues regarding plaintiff's purported conflicts with former Chief Stehr in 2007 through May of 2009 all lacked the requisite proximity in time to be motivating causes for the June **2010** termination by the new Chief, Scott LaChasse. Stehr testified without dispute that he retired as of December 2009 and had no role in LaChasse's consideration of Gardiner's report #34 or the discipline LaChasse determined to be appropriate. There was no factual basis for a reasonable juror to find that plaintiff's termination was motivated by any retaliatory animus.

Moreover, the City had good cause for deciding to discipline plaintiff for what it believed to be serious misconduct, based on an independent outside investigation conducted by James Gardiner, a retired chief of police with no prior ties to Burbank. The good faith reliance on an investigation gives an employer good cause to discipline or terminate and employee for

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misconduct revealed in the investigation report. *Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93, 107-108; see CACI 2405. The *Cotran* good faith defense applies in the FEHA retaliation context. *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 278-279

B. City's Purported "Demotion" Of Plaintiff Not Improper

Even the jury did not buy plaintiff's claim that his re-assignment out of the Deputy Chief captain's assignment was retaliatory. Plaintiff's economist presented alternative damages scenarios, one predicated on the assumption that he was wrongly demoted and should have continued to receive the economic benefits of the Deputy Chief title and assignment, and another scenario where the assumption was that he was properly demoted and should not be given addition economic damages for that title and assignment. The jury selected the latter as the measure of damages, rejecting the wrongful demotion scenario and refusing to award him any of the damages he asserted he should be owed for his so-called demotion. Chief Stehr's decision to re-organize the Department was more than reasonable in light of the evidence of the serious problems the Department was experiencing—which evidence was essentially unchallenged. His re-assignment of plaintiff was simply prudent leadership in light of the dysfunctionality of the Department at the time, plaintiff's role in supervising the Portos I investigation that was being re-opened, and, as both City Manager Flad and Chief Stehr testified, the need for the Chief to regain more direct control over his organization in light of the multitude of brewing allegations. As such, it would be entirely improper to grant plaintiff any of the requested injunctive relief that insists upon listing plaintiff as a Deputy Chief instead of a Captain.

C. Plaintiff Has Not Been Cleared Of Lying Or Other Wrongdoing

Plaintiff joined in the request for the general verdict. Nothing in that general verdict cleared plaintiff's name of any wrongdoing, *Ruiz, supra,* 104 Cal.App.3d at 378 (emphasis added), as indeed, for purposes of an application for equitable relief, a "general verdict rendered by the jury... *should be disregarded*..." In fact, considering the evidence presented and arguments made, it is quite plausible that the 9 pro-plaintiff jurors really found that plaintiff had lied and had committed misconduct, but that in their view the punishment of termination was too harsh for a long-term employee.

Indeed, *inter alia*, the following evidence and testimony presented at trial shows that plaintiff did in fact commit misconduct in obstructing the first Portos Internal Affairs Investigation and lying during the Gardiner Investigation, such that the Court should reject any request for a finding from the Court to the contrary.

Sgt. Misquez testified to his being micro-managed during the Porto's investigation in ways he never had been either before or since in an internal affairs investigation. Sgt. Misquez testified in particular to (a) Taylor's insistence on seeing the list of question to be asked of Omar Rodriguez in advance, (b) Taylor's refusal to allow Misquez to treat Angelo Dahlia as a "focused" officer on the critical issues pertaining to the assault on David Romero, (c) Taylor's initial bellicose reaction to discovering that Dahlia would be treated as a focused officer, followed by (d) his immediate pacifism after learning that the focus was limited to the investigation of Sgt. Penaranda, not Lt. Rodriguez, and (e) Taylor's insistence that Romero be shown the entire photo book of BPD officers rather than only those who were working in the station house on the evening of the assault. Sgt. Misquez and then-Capt. Lowers both testified to Taylor's impugning of Lt. Puglisi's character and honesty when he had never questioned either before and in fact had placed Lt. Puglisi in the highly sensitive position of being the head of Internal Affairs.

Ms. Lowers and Lt. Puglisi both testified to their having long-term, personal, social friendship relationships with the plaintiff until during and at the end of the Portos I investigation. Ms. Lowers also testified to the fact that Taylor attempted to have the allegations in Portos I sustained as to Edgar Penaranda but unfounded as to Omar Rodriguez, both of which Ms. Lowers, Chief Stehr, Lt. Puglisi, and Sgt. Misquez disagreed with for reasons each detailed in their testimony. Lt. Puglisi corroborated Sgt. Puglisi's characterization of being micro-managed more than on any internal affairs investigation he had ever done before, including (a) the frequency of update meetings during the Portos I investigation, (b) Taylor's requirement of knowing why the team wanted to interview which witnesses, and (c) Taylor's unprecedented requirement of seeing the list of interview questions for Omar Rodriguez, and none of the 20 other witnesses, in advance. Gardiner testified to the series of lies he believed Taylor made during his interview which are cataloged in Gardiner's IA Report #34, Trial Exhibit 265, and the

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evidence from a number of witnesses showed that Taylor sought to steer the investigation away from his crony and close confidante, Mr. Rodriguez. Gardiner also testified that Taylor denied making the statement "Omar wasn't there" despite the fact that both former Chief Stehr and former Capt. Lowers both vividly recalled Taylor telling them that, and Gardiner testified to the number of other Rodriquez cronies who made similar statements when Gardiner interviewed them. The most telling evidence was the fact that when an independent investigator re-interviewed witnesses without hindrance from Taylor, he unearthed widespread misconduct that reversed the year-earlier hindered IA findings, plus unearthed much, much more evidence as to Mr. Rodriguez and a number of other BPD officers.

Plaintiff had a means of seeking to clear his name by overturning the disciplinary findings against him in law, but he chose not to use it. This Court need not now step in. Public employment in California is governed by law, not contract. *Miller v. State of California* (1977) 18 Cal.3d. 808, 813. More specifically, the law governing termination of police officers is set forth in the Public Safety Officers' Bill of Rights Act, California *Government Code* § 3300, *et seq.* ("POBRA"). *Government Code* § 3304(b) expressly requires a city to provide an administrative appeal from disciplinary action imposed on a police officer. The "procedural details for implementing the provisions for an administrative appeal are to be formulated by the local agency." *Browning v. Block* (1985) 175 Cal.App.3d 423, 429 (1985); *Howell v. County of San Bernardino*(1983) 149 Cal.App.3d 200, 202-203; *See also Government Code* § 3304.5. POBRA requires a disciplined officer to seek relief from an adverse administrative decision by petition for writ of mandate under *Code of Civil Procedure* § 1094.5 in order to seek to clear his name. *Gales v. Superior Court* (1996) 47 Cal.App.4th 1596, 1603.

Plaintiff could have challenged his termination through an administrative appeal and, if necessary, a writ proceeding, but he chose not to do so. He is not entitled to injunctive relief that would require the City to change those disciplinary findings—e.g. "clear his name"—or alter personnel records or investigations which were not appealed.

IV. PLAINTIFF ELECTED A DAMAGES REMEDY

Plaintiff elected his remedies when he sought future lost income (front pay) through his

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Complaint, First Amended Complaint, economist's testimony at trial, closing argument, and by securing a jury award of front pay. *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 101 (plaintiff entitled to pursue alternative remedies only until one remedy is vindicated by judgment); *Young v. Libbey-Owens Ford Co.* (1985) 168 Cal.App.3d 1037, 1043, n. 5 (pursuance of remedy to a favorable judgment means an election of remedies has occurred). An "employer should not be subjected to inconsistent remedial orders." *City & County of San Francisco v. Fair Employment and Housing Commission* (1987) 191 Cal.App.3d 976, 992-994 (holding state court actions in abeyance where potential for inconsistent relief on employment discrimination issues already subject to federal judgment). At trial, plaintiff presented expert testimony on the amount of his damages from his loss of employment through the date in 2015 that plaintiff had long planned to retire. He was awarded damages consistent with that position compensating him for his lost wages and benefits through the time of his future planned retirement.

Now plaintiff seeks to double dip and asks the Court to award him the additional remedy of injunctive relief because "his ability to find work in the future will be irreparably harmed" [Motion, Decl. of Taylor, (¶ 5), p. 1:11-12] and he "will never be able to obtain work in the future with any other law enforcement agency." [Motion, Decl. of Taylor, (¶ 6), p. 1:15-16.] He cannot recover both damages for future lost income he would have earned and seek injunctive relief in the form of a court order undoing some of the purported harm for which he has been compensated by the jury. If there more injury, this should have been presented to the jury to decide whether or not to compensate him for it.

V. THE COURT SHOULD DENY DUPLICATIVE OR OVERREACHING RELIEF TO WHICH PLAINTIFF IS NOT ENTITLED

Even if the Court were inclined to grant some injunctive relief, which it should not, plaintiff seeks too much. He seeks relief that is cumulative of what he received in the damages award, and overreaches for relief to which he is not entitled.

Plaintiff asks the Court to alter public records, remove those same public records from the personnel files they are in, and "purge" those public records. Ordering the City to alter or purge public records would appear to be a dangerous precedent. Had plaintiff brought a writ of

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administrative mandamus under *CCP* § 1094.5 and prevailed, the case would have been remanded to the City to reconsider the proper penalty in light of the findings of the Court. *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277 (remand to City "well settled"); *Nelson v. Department of Corrections* (1952) 110 Cal.App.2d 331, 335 (remand to reconsider penalty even where most charges overturned); *Kirkpatrick v. Civil Service Comm'n* (1981) 116 Cal.App.3d 930, 932-934 (same). The case of *Williams v. City of Los Angeles* (1991) 229 Cal.App.3d 1627, 1633-1634 illustrates how the case might have proceeded had plaintiff challenged his termination by appeal and writ. In *Williams, supra*, the officer was removed from office and challenged that termination by writ. Shortly thereafter, he applied for and began receiving his retirement pension. Notwithstanding the retirement, following the writ, the case was remanded back to the City for reconsideration of the proper penalty in light of the trial court's findings on the writ petition. *Id.*, at 1634.

As the Court determined by giving Defendant's special jury instruction No. 8, infra, termination is a penalty within the City's discretion for virtually any of the misconduct charges against Plaintiff as they each involved essentially some form of dishonesty in internal investigations. *See e.g. Paulino v. Civil Service Comm'n* (1985) 175 Cal.App.3d 962, 972 (false report); *Kolender v. San Diego County Civ. Serv. Comm'n* (2005) 132 Cal.App.4th 716, 721 (lying re misconduct); *Haney v. City of Los Angeles* (2003) 109 Cal.App.4th 1, 12 (false reports). Thus, the City might still be have properly terminated plaintiff even if some of the charges were actually held to have been unsubstantiated.

Therefore, in this case, there is no basis for altering personnel records, or removing some of them completely from plaintiff's personnel file and pretending as if he never committed misconduct and never lied. Even if plaintiff had directly attacked the propriety of his termination by administrative appeal and writ, the case would have been remanded to the City for reconsideration.

In addition, even if the Court were inclined to issue injunctive relief to overturn the termination, which it should not, the Court should only order that plaintiff be allowed to apply for a CCW permit as if he had retired. The Chief of Police retains discretion to issue or not issue

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PROOF OF SERVICE

I am over the age of eighteen (18) and not a party to this action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071.

On **May 9, 2012,** I served the following document(s): **DEFENDANT CITY OF BURBANK'S OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF** on interested parties in this action by placing a true and correct copy of such document, enclosed in a sealed envelope, addressed as follows:

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☐ **BY FAX:** The facsimile transmission of the foregoing document was reported as complete and without error to the following parties as indicated on the attached service list. A copy of the transmission report as issued by the transmission facsimile machine is attached pursuant to California Rules of Court, Rule 2008(e)(4).

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 9, 2012 at Los Angeles, California.

/s/
Lisa J. Villarroel

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